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CHARLES ELMORE CROLEY

IN THE

# Supreme Court of the United States

No. 173

UNITED STATES AND INTERSTATE COMMERCE  
COMMISSION,

*Appellants,*

UNITED STATES SMELTING, REFINING & MINING COM-  
PANY, DENVER & RIO GRANDE WESTERN RAILROAD  
COMPANY, AND UNION PACIFIC RAILROAD COM-  
PANY,

*Appellees,*

AND

UNITED STATES AND INTERSTATE COMMERCE  
COMMISSION,

*Appellants,*

DENVER AND RIO GRANDE WESTERN RAILROAD COM-  
PANY, UNION PACIFIC RAILROAD COMPANY AND  
AMERICAN SMELTING AND REFINING COMPANY,

*Appellees,*

CONSOLIDATED CAUSES

## BRIEF FOR INTERVENOR, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

THE PUBLIC UTILITIES COMMIS-  
SION OF THE STATE OF COLORADO

RALPH C. HORTON  
JOHN R. BARRY  
JOSEPH W. HAWLEY  
Commissioners

By: JOSEPH W. HAWLEY  
Commissioner

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v.

UNITED STATES SMELTING, REFINING & MINING COM-  
PANY, DENVER & RIO GRANDE WESTERN RAILROAD  
COMPANY, AND UNION PACIFIC RAILROAD COM-  
PANY,

*Appellees,*

AND

UNITED STATES AND INTERSTATE COMMERCE  
COMMISSION,

*Appellants,*

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COM-  
PANY, UNION PACIFIC RAILROAD COMPANY AND  
AMERICAN SMELTING AND REFINING COMPANY,

*Appellees,*

CONSOLIDATED CAUSES

**BRIEF FOR INTERVENOR, THE PUBLIC UTILITIES  
COMMISSION OF THE STATE OF COLORADO**

**INTRODUCTION**

This Intervenor, The Public Utilities Commission of the State of Colorado intervened in the proceedings before the Interstate Commerce Commission which are now before this Court (R. 873), on behalf of the mining industry and the producers of ore in Colorado. It intervened in their behalf in Cases 1324 and 1325 (R. 297) and again in Cases 1525 and 1524 (R. 445), in all of which cases, this Intervenor has taken, and now takes the position that the Orders of the

Interstate Commerce Commission complained of are unlawful and void.

We have no disposition to burden the Court with a repetition of the arguments supporting that position. We believe it sufficient to state that we hereby adopt and join in the brief being filed with this Court by the Intervenor, The Colorado Mining Association, commend it to the attention of the Court, and urge that the Court sustain the decision of the trial Court and enjoin permanently the questioned Order of the Interstate Commerce Commission as unlawful and void.

This Commission does not propose to do more in this brief than to attempt to focus the attention of the Court upon two arguments appearing in the brief of The Colorado Mining Association, in the hope that they will receive the consideration we believe they deserve. Arguments covering other facets of the case are set forth fully and amply in the briefs of Appellees and other Intervenor. We hope we will be pardoned for indulging a normal fear that so much intensified argument has been directed to the other aspects of the case, that the two arguments above referred to may be partially lost from view. They are not the grounds of the trial Court's decision in these cases, and while we concur wholeheartedly with those grounds, we feel that the Order of the Commission could have been properly enjoined on these two grounds alone.

We shall discuss these two grounds briefly and in order:

## ARGUMENT

- I. THE ADVERSE ECONOMIC EFFECTS OF THE PROPOSED ORDER UPON THE MINING INDUSTRY OF COLORADO WERE NOT CONSIDERED BY THE COMMISSION, HENCE THE ORDER IS ARBITRARY AND CAPRICIOUS.

**II. THE PROPOSED ORDER AFFECTS COMMERCE ALMOST WHOLLY INTRASTATE IN CHARACTER, HENCE IS ARBITRARY AND UNREASONABLE.**

**I.**

***THE ADVERSE ECONOMIC EFFECTS OF THE PROPOSED ORDER UPON THE MINING INDUSTRY OF COLORADO WERE NOT CONSIDERED BY THE COMMISSION, HENCE THE ORDER IS ARBITRARY AND CAPRICIOUS.***

The marginal mining industry of Colorado is far from what could be called a cohesive industry. It retains about as much of "rugged individualism" as it possessed at its birth during the last century. The marginal miner of today is still the pioneer of the 80's, and he lacks the power of any united expression in his own behalf about as much as did his predecessors.

When this Commission intervened in these cases it intervened largely because it felt that the marginal mines of Colorado constituted a very necessary and important section of the industry of Colorado, and that they needed this Commission as one of their spokesmen in this litigation.

With respect to this first argument we do not believe we should do more than to refer to the evidence and adopt the arguments contained in the brief of Intervenor, The Colorado Mining Association, and call attention to the fact that the mining industry was afforded no opportunity to be heard. We will pass on to the second point with just this observation: We believe that when a fact finding, policy making, regulatory body such as the Interstate Commerce Commission or our own Commission embarks on a factual investigation of its own motion, it should be more than care-



ful to elicit and develop all the facts favorable to all the parties to the controversy. From the record of these proceedings it would not appear that this has been done—the interests of the mining producers were not even casually considered by the Commission.

## II.

### ***THE PROPOSED ORDER AFFECTS COMMERCE ALMOST WHOLLY INTRASTATE IN CHARACTER, HENCE IS ARBITRARY AND UNREASONABLE.***

As calculated from the figures set forth in the brief of Intervenor, The Colorado Mining Association, an average of approximately 96% of all inbound movements to the Leadville, Colorado, smelter from 1936 to 1944, inclusive, were intrastate movements and not interstate movements. In view of such a preponderance we desire to affirm most earnestly the position taken by The Colorado Mining Association, that the Order of the Commission is arbitrary and unreasonable in its attempt to affect what is overwhelmingly of intrastate concern. If the jurisdiction of federal regulatory bodies is allowed to expand itself into such extensive coverage of matters which are so thoroughly intrastate in character, there is little need of the existence of state regulation at all.

We assure this Court that we are not ambitious for our jurisdiction in the sense that we have any desire to reach out into federal fields, but we do hold it our duty to maintain the jurisdiction that has been intrusted to our keeping. We feel there has been an overreaching on the part of the Interstate Commerce Commission in these proceedings, unconscious though it has undoubtedly been, and we trust that the Court will establish some guide posts to boundary lines for future guidance.

## CONCLUSION

We submit in conclusion that the decision of the trial Court should be sustained and that the Order of the Commission dated May 18, 1948 should be permanently enjoined.

Respectfully submitted,

THE PUBLIC UTILITIES COM-  
MISSION OF THE STATE OF  
COLORADO

RALPH C. HORTON  
JOHN R. BARRY  
JOSEPH W. HAWLEY

Commissioners

By: JOSEPH W. HAWLEY  
Commissioner